BILL NO. G-94-09-25

GENERAL ORDINANCE NO. G-Lesh.

AN ORDINANCE AMENDING POLICY 8.1.A.12 OF THE CITY'S POLICY AND PROCEDURE MANUAL

WHEREAS, policy 8.1.A.12 of the city's Policy and Procedure Manual currently contains definitions to be amended.

NOW THEREFORE BE IT ORDAINED BY THE COMMON COUNCIL OF THE CITY OF FORT WAYNE, INDIANA:

SECTION 1. Policy 8.1.A.12 of the city's Policy and Procedure Manual is hereby amended to read as follows:

"12. DEFINITIONS:

NOTE: THE BENEFITS LISTED BELOW WILL BE OFFERED TO EMPLOYEES AS DEFINED IN EACH OF THE RESPECTIVE CATEGORIES.

a. Permanent Full-Time employees include all hired into positions of indefinite duration, normally working at least forty (40) hours per week.

b. Permanent Part-Time employees include all hired into positions of indefinite duration, normally working less than forty (40) but at least twenty (20) hours per week. These employees shall receive the benefits as enumerated under PT, below. For those items marked "Prorated", the employee will receive benefits based on the number of hours worked in a week as a percentage of forty (40) hours.

c. Temporary employees include all hired into positions of a limited duration, working either full or part-time hours. These employees are considered as outside applicants for all other positions in the City they may bid on. Employees working less than twenty (20) hours per week will be considered as temporary for purposes of receiving benefits.

d. Unclassified employees include those employees listed as unclassified in the salary ordinance.

e. Prorated benefits shall be calculated on the basis of the average number of hours worked in a week as a percentage of forty (40) hours (see example).

An employee's supervisor will be responsible for determining the average number of hours an employee works each week. The average number of hours worked, will be re-evaluated every three months from the initial date of employment. It is on this basis that prorated benefit calculations will be made.

PERSONAL DAY, HOLIDAY, VACATION AND SICK LEAVE EXAMPLE:

- 20 hours worked per week/40 hour full-time work week = 50%
- An employee working twenty (20) hours will receive 50% of the benefit (marked "prorated") of a full-time employee.

BENEFITS*	FT	PT	T	U
Life Insurance	Yes	No	No	Yes
Health Insurance	Yes	No	No	Yes
Personal Days	Yes	Prorated	No	No
Paid Holidays	Yes	Prorated	No	No
Paid Vacation	Yes	Prorated	No	No
Sick Leave	Yes	Prorated	No	No
Leave of Absence	Yes	Yes	No	Yes
Employee Assistance Program (EAP)	Yes	Yes	No	Yes
Worker's Comp	Yes	Yes	Yes	Yes
Unemployment	Yes	Yes	Yes/No	Yes
Reservist Duty	Yes	Prorated	No	Yes
Jury Duty	Yes	Prorated	No	No
Bereavement Pay	Yes	Prorated	No	No

*Individuals working less than forty (40) hours and receiving benefits on the effective date of this policy shall retain said benefits until the status or hours worked of the affected employee changes."

SECTION 2. That this Ordinance shall remain in full force and effect from the after its passage and any and all necessary approval by the Mayor and shall apply to all agreements entered into after its effective date.

Council Member

APPROVED AS TO FORM
AND LEGALITY

J. Timothy McCaulay
Corporation Counsel

A. OUTLINE OF BENEFITS

NOTE: COVERAGE ISSUES ARE DETERMINED BY THE TERMS AND CONDITIONS OF THE PARTICULAR POLICY OR PLAN AND NOT BY ANY REPRESENTATIONS MADE BY THE BENEFITS ADMINISTRATOR OR ANY OTHER CITY STAFF MEMBER.

1. MANDATORY BENEFITS. These apply to all City and Utilities employees not covered under either the Police or Fire Pension Plans.

   a. Social Security -- provides benefits for death, disability and retirement. Check local Social Security Office for specific information.
   b. Workers Compensation -- injuries or illnesses incurred on the job are compensable under provisions of state law. This includes payment of medical expenses resulting from death, dismemberment and disability.
   c. Unemployment Compensation -- all employees are eligible for income continuance payments in accordance with state laws in the case of involuntary termination based on a lack of work situation or other good cause. Please check with the Human Resources Office regarding this mandatory benefit prior to separation or layoff.

2. MEDICAL AND DENTAL INSURANCE BENEFITS

   a. Medical and dental insurance is offered to all permanent full-time employees upon completion of thirty (30) days of employment.
   b. Two medical insurance coverages are offered; 1) a basic group health plan, and 2) an HMO. The premiums vary according to the carrier chosen and, with the HMO only, according to family size. For specific coverage information, refer to the insurance booklets issued to all eligible employees or contact the Benefits Administrator in the Human Resources Department.
   c. For specific coverage information on dental insurance, refer to the insurance pamphlet issued to all eligible employees or contact the Benefits Administrator in the Human Resources Department.
   d. Each new employee is provided the opportunity to choose a medical insurance carrier during their insurance orientation. The City will hold an open-enrollment period once a year giving all employees the opportunity to switch medical carriers if they so desire.
   e. Upon termination (separation) of employment, except in cases of gross misconduct, the City must offer continuation of health coverage (COBRA). This continuation will be at the terminating employee's expense and will be the same coverage that the employee had at time of termination. Coverage for the employee

can continue for up to eighteen (18) months. If an active employee is going through a divorce or has a child who has reached the maximum age for coverage under our insurance plan, the employee must contact the Human Resources Department about continuation of coverage, through COBRA, for those dependents. In those situations, coverage can be continued for up to thirty-six (36) months.

3. GROUP LIFE INSURANCE

a. Each active, permanent full-time employee will be offered a $15,000 life insurance policy.

b. Each active, permanent full-time employee will be offered a $15,000 Accidental Death and Dismemberment Policy through Lincoln Life.

4. LONG-TERM DISABILITY (LTD)

a. Long-term disability is provided to all permanent full-time employees, except Police and Fire, upon completion of thirty (30) days of employment.
b. LTD coordinates with Social Security Disability and PERF to guarantee 65% (maximum $5,000 per month, minimum $50 per month) of wages while are disabled.
c. In order to file a claim for LTD, the employee must be off work (can still be in a pay status but not actively working) for a period of 90 days.
d. LTD continues until the employee is able to come back to work until death, or reaches age 65.
e. For further coverage information, contact the Benefits Administrator in the Human Resources Department.

5. FLEXIBLE BENEFIT PLAN

a. The Flexible Benefit Plan is designed to allow employees to set aside a designated amount of his/her salary, through payroll deduction, on a "pre-tax" basis, to reimburse employees for non-reimbursed expenses.
b. On an annual basis, employees will be eligible to set money aside in any of four different spending accounts - medical expenses, dependent-care expenses, health premium reimbursement, and supplemental group term life insurance.
c. Upon employment each permanent full-time (and permanent part-time) employee is given the opportunity to sign up for the Flex Plan during their insurance orientation.
d. The amount of money the employee chooses to set aside on a "pre-tax" basis will be deducted from their paycheck each pay period.

e. Reimbursements are made on a monthly basis upon submission of a claim form and the proper back-up documentation. The reimbursement checks will be sent directly to you. Monies deducted but not spent by the end of the calendar year shall be forfeited by the employee.

6. DEFERRED COMPENSATION

a. A Deferred Compensation Plan is a voluntary benefit offered to all City employees. This program allows employees to defer income during peak earning years and set it aside as retirement savings. The funds set aside are pre-tax dollars and, therefore, reduce the amount of current income subject to taxes.

b. The amount of money the employee chooses to set aside will be deducted from the employee's paycheck on a bi-weekly basis.

c. Employees will be allowed to increase or decrease deductions four (4) times a year, once each quarter. The minimum contribution per pay is $10.00.

7. RETIREMENT

a. Public Employees' Retirement Fund (PERF) is the pension for all Civil City/Utilities employees except for Police and Fire. These departments have their own pension plans. This a mandatory pension plan.

b. Subject to the terms and conditions of collective bargaining agreements, the City shall contribute a 3% payment on behalf of the employee. If the employee severs employment with the City and is not qualified for retirement, they may apply for a cash refund of the 3% contribution plus any accumulated interest contributed. The employee's monies will collect interest at the current rate of interest set by PERF.

c. The Human Resources Department will assist all retiring employees as to proper completion of paperwork necessary for retirement. Please contact the Human Resources Department at least one month prior to your anticipated retirement.

d. Utilities and City employees, except for Police and Fire, will be eligible for a settlement for unused accumulated sick pay in accordance with Policy 7.6 A.4. The retiring employee is eligible for a lump sum settlement of unused vacation entitlement at the employee's current hourly rate.

e. Each employée (except Police and Fire) who, after six years of service, retires from the City under a recognized pension plan shall receive a life insurance policy in the amount of $5,000 at no cost to the employee for the rest of his life.

f. Retiring employees, who meet the eligibility requirements, will be offered continuation of their medical insurance per state law IC-5-10-8-2-1. This continuation will be at the employee's expense or paid according to Policy 7.6 A.4. The coverage will be the same as what the employee had at time of retirement. If the retiringemployee does not meet the eligibility requirements for continuation of health insurance through the state law, they would be eligible for continuation under COBRA.

8. EMPLOYEE ASSISTANCE PROGRAM (EAP)

a. All permanent full-time and part-time employees and their immediate family members are eligible to receive EAP services. Family members shall be defined in accordance with the health insurance policy currently in effect.

b. Confidentiality shall be maintained. No information shall be released unless an employee gives written permission.

c. Employees participating in the EAP must schedule all counselling outside of regular working hours unless directed otherwise by their supervisor.

9. DEATH BENEFITS

Upon death of an active employee, benefits will be paid as follows:

a. Upon presentation of a death certificate, life insurance benefits will be processed and paid to the designated beneficiary.

b. PERF money will be paid in a lump sum to the designated beneficiary unless the deceased employee met the eligibility requirements for a monthly pension benefit. The lump sum will consist of the employee's contribution plus accumulated interest. For Police and Fire, please refer to the pension rules.

c. The beneficiary will be paid a lump sum settlement of unused sick pay entitlement according to Policy 7.6 A.4., excluding Police and Fire, and unused vacation entitlement at the employee's current hourly rate.

d. The survivor(s) will be eligible for continuation of health insurance, through COBRA, at their expense. This continuation is for 36 months.

10. PARKING ACCOMMODATIONS

a. Parking options will be made available at the discretion of the Department Manager for Civil City and City Utilities employees who work in the City/County Building. A lot is located between North Clinton Street and Barr Street and is open on a daily basis.

b. The City/County Metered Parking Lot, located on the Plaza behind the City/County Building, is provided for public use only and not for employee use during their scheduled working hours. Employees who park on the City/County Metered Parking Lot during working their scheduled working hours are in violation of this policy and may be subject to disciplinary action, up to and including termination.

11. For other benefits not listed in this section, refer to appropriate policy.

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Jury Duty	Yes	Prorated	No	No
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Read the first time in full and on motion by Gia Quinta, seconded by ~~[illegible]~~, and duly adopted, read the second time by title and referred to the Committee on Regulations (and the City Plan Commission for recommendation) and Public Hearing to be held after due legal notice, at the Common Council Conference Room 128, City-County Building, Fort Wayne, Indiana, on ~~[illegible]~~, the ~~[illegible]~~, day of ~~[illegible]~~, 19~~[illegible]~~, at ~~[illegible]~~ o'clock 4 M., E.S.T.

DATED: 9-27-94

Sandra E. Kennedy
SANDRA E. KENNEDY, CITY CLERK

Read the third time in full and on motion by Helmke, seconded by ~~[illegible]~~, and duly adopted, placed on its passage. ~~PASSED~~ LOST by the following vote:

	AYES	NAYS	ABSTAINED	ABSENT
TOTAL VOTES	2	3	1	3
BRADBURY		✓		
EDMONDS				✓
GiaQUINTA				✓
HENRY			✓	
LONG	✓			
LUNSEY				✓
RAVINE	✓			
SCHMIDT		✓		
TALARICO		✓		

DATED: 10-11-94

Sandra E. Kennedy
SANDRA E. KENNEDY, CITY CLERK
Robyn E. Lee / Deputy Clerk

Passed and adopted by the Common Council of the City of Fort Wayne, Indiana, as (ANNEXATION) (APPROPRIATION) (GENERAL) (SPECIAL) (ZONING) ORDINANCE RESOLUTION NO. ~~[illegible]~~ on the ~~[illegible]~~, 19~~[illegible]~~

(SEAL)

~~SI~~ PRESIDING OFFICER

Please Note -
This Ordinance failed because "motion" was taken at the latter time for a reconsideration Vote - and therefore the Ordinance "failed" "Lost" 11-13-94

~~th~~ ayor of the City of Fort Wayne, Indiana, on ~~at~~ ay of ~~[illegible]~~, 19~~[illegible]~~, ~~at~~ o'clock ~~[illegible]~~, M., E.S.T.

SANDRA E. KENNEDY, CITY CLERK

Approved and signed by me this ~~[illegible]~~ day of ~~[illegible]~~, 19~~[illegible]~~, at the hour of ~~[illegible]~~ o'clock ~~[illegible]~~ M., E.S.T.

PAUL HELMKE, MAYOR

The City of Fort Wayne

Paul Helmke, Mayor

24-Hour Job Line (219) 427-1186
Benefits Administration (219) 427-1198
EEO/Affirmative Action (219) 427-1180
Labor Relations (219) 427-1180
Payroll (219) 427-1292
Personnel (219) 427-1180
TDD (219) 427-1180
FAX (219) 427-1393

Department of Human Resources
Room 380

M E M O R A N D U M

To: Members of the City of Ft. Wayne Common Council

From: Nelson Peters, Director of Human Resources

Subject: Ordinance for Part-Time Benefits

Date: August 31, 1994

****

As more individuals have begun to work schedules of less than forty (40) hours per week, it has become necessary to place a greater distinction between full and part-time employees. If passed, the enclosed ordinance will change these definitions and the city policy that governs their respective benefits.

The major difference being proposed is that full-time employees will no longer be considered as such if they work less than forty (40) hours per week. Additionally, new part-time employees will no longer be eligible for health insurance benefits.

I look forward to your favorable consideration of this ordinance. Should you have any questions, please don't hesitate to call.

Enclosure

G-94-09-25

MEMO

TO: GREG PURCELL,
CHIEF OF STAFF
CITY OF FORT WAYNE

DATE: OCTOBER 21, 1994

CC: PAUL HELMKE
NELSON PETERS

FROM: J. TIMOTHY McCAULAY

RE: APPLICATION OF I.C. 22-7-1-2 AND I.C. 22-7-1-3

You have requested a legal opinion as to the application of I.C. 22-7-1-2 and I.C. 22-7-1-3 to a pending bill before the Fort Wayne City Council which would exclude from bargaining units recognized by the City of Fort Wayne part-time employees.

I.C. 22-7-1-2 provides:

> No worker or group of workers who have a legal residence in the State of Indiana shall be denied the right to select his or their bargaining representative in this state or be denied the right to organize in a local union or association to exist within and pursuant to the laws of the State of Indiana: Provided, That this act in no way shall be deemed to amend or repeal any other provisions of the National Labor Relations Act [29 U.S.C., §§ 151-166].

I.C. 22-7-1-3 provides:

> A person who prevents another person from forming or belonging to a labor organization commits a Class B Misdemeanor.

The interpretation of the application of the above-quoted statutes to the pending legislation before the City Council requires a reference to the Indiana Court of Appeals decision in Michigan City Area Schools v. Siddall (1981), Ind. App., 427 N.E. 2d 464, in which those statutes were construed.

In Siddall, the dispute was a labor dispute involving non-teaching employees of the school. Id. at 465. The Court noted that the "central issue in dispute was the school's refusal to recognize and negotiate with the individual selected by the classified employees to represent them." Id. at 466. In making its decision, the Court pointed out the "[u]nder the common law

there is no legal duty for employers and employees to engage in the collective bargaining process." Id. at 466. The Court first looked at whether I.C. 22-7-1-2 would apply to such situation. Id. at 467. The Court noted that a 1971 decision of the Appellate Court, Peters v. Poor Sisters of St. Francis Seraph (1971), 140 Ind. App. 453, 267 N.E. 2d 558, held that the provisions of I.C. 22-7-1-2 "did not impose upon an employer either a duty to recognize the union as collective bargaining agent or a duty to engage in the collective bargaining process." Id. Thus, I.C. 22-7-1-2 does not require a public employer to recognize any bargaining unit or bargaining agent for a particular class of employees. Id.

The cited court decisions rely heavily on an analysis given by Prof. Julius Getman, formerly of the Indiana University School of Law. Prof. Getman, in commenting on I.C. 22-7-1-2, stated:

> At first reading this appears to be a significant statute. The right of employees to select a bargaining representative seems to imply that management is required to recognize and bargain with a properly chosen union. But careful reading of the statute indicates that it was not meant to impose a duty on employers to bargain collectively. The title and language of the statute suggests that its primary purpose was to permit the formation of local unions and that the legislature intended to prevent undue control by national unions over local members. This interpretation is supported by such unofficial legislative history as can be found, and by the absence of a remedy for violation or provision for determining questions of majority choice. Even the unnecessary reference to the NLRA suggests an attempt to regulate union internal organization rather than collective bargaining. 42 Ind. Law Journal, p. 87. (emphasis added).

Moreover, the Siddall court made it clear that a public employer was free to impose whatever conditions it preferred with respect to collective bargaining and that the imposition of such conditions "did not illegally interfere with the employees' constitutional right to select whomsoever they desired as agent by refusing to deal with that agent." Id. at 468.

Conclusion: I.C. 22-7-1-2 and I.C. 22-7-1-3 are no impediment to the City Council adoption of the proposed legislation excluding part-time employees from the collective bargaining process.

CONCLUSION—There was a sufficient showing that Tondra's attendance at trial court not be procured by subpoena. Therefore, the trial court did not err in admitting his deposition testimony.

The use of depositions of non-party witnesses as evidence at trial is regulated by T.R. 32(A)(3):

> (3) *The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds*:
>
> (a) that the witness is dead; or
>
> (b) that the witness is outside the state, unless it appears that the absence of the witness was procured by the party offering the deposition; or
>
> (c) that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or
>
> (d) *that the party offering the deposition has been unable to procure the attendance of the witness by subpoena*; or
>
> (e) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used; or
>
> (f) upon agreement of the parties.

(emphasis supplied)

As no Indiana court has interpreted T.R. 32(A)(3)(d), we are obliged to do so. It harbors no mystery. One author, in interpreting the federal counterpart of the Indiana provision, has said that

> [t]he clause .... is evidently intended to cover a case in which the party cannot effectively prove that the deponent is over one hundred miles from the court, but has been unable to serve a subpoena on him. A showing of some diligence will probably be required.

Pike & Willis, The New Federal Deposition-Discovery Procedure, 38 *Col.L.Rev.* 1436, 1447 (1938), quoted in 8 *C. Wright & A. Miller, Federal Practice and Procedure* § 2146 (1970).

[13] The question whether such a deposition should be allowed into evidence is one committed to the trial court's discretion. *United States v. Bowen* (5th Cir. 1969) 411 F.2d 923. *See also Wells v. Gibson Coal Co.* (1976) 170 Ind.App. 445, 352 N.E.2d 838.

[14] This court will not weigh the evidence. In view of Rowe's testimony regarding his unsuccessful efforts to serve Tondra with a subpoena, we can only conclude that the trial court's finding that Tondra was unavailable to testify in person was supported by sufficient proof.

The considerations as to trial to the court discussed in Issues Three and Four apply with equal force here. *King, supra.* It could be added that there were photos depicting Parker's injuries admitted into evidence without objection by virtue of which the trial court could have assessed Parker's damages without relying upon the disputed testimony. *Jackson, supra.*

Judgment affirmed.

SHIELDS and SULLIVAN, JJ., concur.

MICHIGAN CITY AREA SCHOOLS, Plaintiff-Appellant,

v.

Jack SIDDALL, individually and in his capacity as agent for the Michigan City Area Schools Classified Association, and Michigan City Area Schools Classified Association, and Dianna Kahn, Diane Novak and Sarah Kowalski, individually and as representatives of a class composed of all striking classified employees employed by the Michigan City Area Schools, Defendants-Appellees.

No. 3–580A144.

Court of Appeals of Indiana, Third District.

Oct. 29, 1981.

City schools sought injunction to prohibit strike activity of nonteaching school

employees, and employees counterclaimed seeking to restrain schools from interfering with their choice of bargaining representatives. The Superior Court, La Porte County, Raymond M. Fox, J., permanently enjoined employees from participating in strike, restrained schools from interfering with or preventing employees from selecting bargaining representative and ordered parties to engage in collective bargaining, and schools appealed. The Court of Appeals, Garrard, J., held that city school board had authority to condition its participation in voluntary collective bargaining with nonteaching school employees on employees' joining an organization consisting exclusively of school employees and use of bargaining representatives who were employees of the school or attorneys.

Reversed and remanded.

Staton, J., concurred and filed opinion.

1. Labor Relations ⇐177

Under the common law there is no legal duty for employers and employees to engage in the collective bargaining process.

2. Constitutional Law ⇐90.1(7), 91

Individual's constitutionally protected freedoms of speech and association permitted nonteaching employees of city schools to join labor organization of their choice, although no duty was imposed upon schools to deal with organization or its representatives. U.S.C.A.Const. Amend. 1.

3. Constitutional Law ⇐90.1(7), 91

If there is no legal obligation statutorily or at common law to engage in good faith collective bargaining with duly chosen agent of a group of employees, there is no legal interference with an employee's constitutional freedom of speech or association where employer does no more than refuse to recognize and engage in collective bargaining with some employee-selected organization or its agents. U.S.C.A.Const. Amend. 1.

4. Constitutional Law ⇐90.1(7), 91

Illegal interference of employee's constitutional freedom of speech or association exists where employer seeks to penalize or take action against employees for actions of associating. U.S.C.A.Const. Amend. 1.

5. Labor Relations ⇐177

In absence of legal obligation, the employer has same freedom of choice to deal with or reject dealing with a bargaining agent that any party has in electing whether or not he wishes to deal with another party's admittedly authorized agent or servant.

6. Labor Relations ⇐177

City school board had authority to condition its participation in collective bargaining with nonteaching school employees on employees' forming organizations consisting exclusively of school employees and on use of bargaining representatives who were employees of the school or attorneys since school board was not legally obligated to engage in the collective bargaining, but did so voluntarily. IC 22–7–1–1, 22–7–1–2 (1976 Ed.).

Merlyn C. Bartlett, Michigan City, Edward L. Volk, Daniel E. Lewis, Jr., Newby, Lewis, Kaminski & Jones, La Porte, for plaintiff-appellant.

Wayne O. Adams III, Christine J. Ratliff, Bingham, Summers, Welsh & Spilman, Indianapolis, for defendants-appellees.

GARRARD, Judge.

This is an action for injunctive relief in a labor dispute involving non-teaching employees of the Michigan City Area Schools (the school).

It appears that during the late summer of 1979 the school board adopted a voluntary policy for collective bargaining with its nonteaching employees (hereafter referred to as the classified employees).[1] In August a number of these employees: bus drivers, custodians, cooks and maintenance people,

1. Supervisors and confidential employees were also excluded. In addition, provision was made for separate treatment of full time and part time employees.

refused to perform their work assignments. The central issue in dispute was the school's refusal to recognize and negotiate with the individual selected by the classified employees to represent them.

The voluntary recognition and bargaining policy adopted by the school was expressly conditioned upon two factors. It would not recognize a classified employee organization if the organization had any members who were not employees of the school, and it would not negotiate with "representatives" who were neither employees of the school nor attorneys. In explanation of these requirements the policy stated,

> "The intent of this definition is for the school corporation to recognize only local classified school employee organizations made up solely of full-time classified employees and/or part-time classified employees, while recognizing any individual employee's right to join any organization of the employee's choice."

The policy statement provided that the school would bargain collectively on certain subjects with a properly selected representative. The policy statement also expressed the school's retained right to revoke or change the policy declaration at any time with the proviso that no such action would affect any collective bargaining contracts that might have been entered into.

The classified employees indicated their desire to be represented in negotiations by an employee of the Indiana State Teachers' Association who was neither an employee of the school nor an attorney.

When the school refused, the strike ensued. The school then sought an injunction to prohibit the strike activity and the classified employees counterclaimed seeking to restrain the school from interfering with their choice of bargaining representatives. After a hearing the trial court permanently enjoined the classified employees from participating in a strike, restrained the school from interfering with or in any way preventing the classified employees from selecting the person or persons of their choice "to be their bargaining representative," and ordered the parties to engage in collective bargaining.[2]

The school appeals contending that the orders restraining it from interfering with the choice of bargaining representative and mandating it to bargain collectively are contrary to law. Despite the practical wisdom in the trial court's decision, we are required to sustain the appeal.

In order to properly consider the issues presented it is necessary to briefly consider the legal posture of the parties.

[1] Under the common law there is no legal duty for employers and employees to engage in the collective bargaining process. *Co. Dept. of Public Welfare v. Amer. Fed. S. C. & M. E., AFL–CIO* (1981), Ind.App., 416 N.E.2d 153. In addition, the public employees involved in this dispute are not covered by the Indiana Teacher Bargaining Act, IC 20–7.5–1–1 *et seq.*, or the National Labor Relations Act, as amended. 29 U.S.C.A. § 152(2).[3]

On the other hand, the School Powers Act, IC 20–5–2–2(7), authorizes school boards to employ such persons as it needs in the work categories occupied by the classified employees and fix their salaries and compensation.[4] We have previously held that such authority is sufficient to validate collective bargaining contracts entered into by the parties. *Gary Teachers Union v. School City of Gary* (1972), 152 Ind.App. 591, 284 N.E.2d 108.

[2] Furthermore, it is clear that an individual's constitutionally protected freedoms of speech and association permit the classified employees to join a labor organization

2. Additional provisions in the order are not challenged on appeal, nor is that portion enjoining the strike activity. *See, e. g., Anderson Fed. of Teachers v. School City* (1969), 252 Ind. 558, 251 N.E.2d 15, *cert. den.*, 399 U.S. 928, 90 S.Ct. 2243, 26 L.Ed.2d 794.

3. IC 22–6–4–1 applying generally to public employees was declared unconstitutional. *IEERB v. Benton Comm. Sch. Corp.* (1977), 266 Ind. 491, 365 N.E.2d 752.

4. School bus drivers are the subject of separate legislation. *See* IC 20–9.1–1–1 *et seq.*

of their choice, although no duty is thereby imposed upon the school to deal with the organization or its representatives, *Co. Dept. of Public Welfare, supra.*

[3–5] That fact is critical. If there is no legal obligation statutorily or at common law to engage in good faith collective bargaining with a duly chosen agent of a group of employees, there is no *illegal* interference with an employee's constitutional freedom of speech or association where an employer does no more than refuse to recognize and engage in collective bargaining with some employee selected organization or its agents.[5] In the absence of legal obligation the employer has the same freedom of choice to deal with or reject dealing with a "bargaining" agent that any party has in electing whether or not he wishes to deal with another party's admittedly authorized agent or servant.

[6] It is first suggested that we determine the impact of IC 22–7–1–1 and 2 upon this analysis. This statute, originally enacted in 1957, provides,

"22–7–1–1. As used in this act [22–7–1–1, 22–7–1–2], the term 'local union' shall mean any branch or chapter of a national labor organization, the jurisdiction of which is limited to a particular geographical area."

"22–7–1–2. No worker or group of workers who have a legal residence in the state of Indiana shall be denied the right to select his or their bargaining representative in this state, or be denied the right to organize into a local union or association to exist within and pursuant to the laws of the state of Indiana: Provided, That this act shall in no way be deemed to amend or repeal any of the provisions of the National Labor Relations Act [U.S.C., tit. 29, §§ 151–166]."

Sitting *en banc* the Appellate Court determined in *Peters v. Poor Sisters of Saint Francis Seraph* (1971), 148 Ind.App. 453, 267 N.E.2d 558, that these provisions did not impose upon an employer either a duty to recognize a union as collective bargaining agent or a duty to engage in the collective bargaining process. The court instead, at 267 N.E.2d 562, adopted Professor Getman's analysis,

"'At first reading this appears to be a significant statute. The right of employees to select a bargaining representative seems to imply that management is required to recognize and bargain with a properly chosen union. But careful reading of the statute indicates that it was not meant to impose a duty on employers to bargain collectively. The title and language of the statute suggest that its primary purpose was to permit the formation of local unions and that the legislature intended to prevent undue control by national unions over local members. This interpretation is supported by such unofficial legislative history as can be found, and by the absence of a remedy for violation or provision for determining questions of majority choice. Even the unnecessary reference to the NLRA suggests an attempt to regulate union internal organization rather than collective bargaining.' 42 Ind.Law Journal, p. 87."

We, therefore, conclude that the cited statute has no impact on the bargaining issue before us. While it is consistent with the employees' rights of free association, as already discussed, it is unnecessary to their recognition.

The only remaining question, then, is the impact of the school's policy statement upon what must otherwise be held its freedom of choice to engage in voluntary bargaining. *See Petri Cleaners, Inc. v. Automotive Employees, etc.* (1960), 53 Cal.2d 455, 2 Cal. Rptr. 470, 349 P.2d 76.

The policy adopted by the school board, as already outlined, stated that it would recognize for purposes of voluntary collective

5. Illegal interference exists, instead, where the employer seeks to penalize or take action against the employee for the actions of associating. *See, e. g., NAACP v. Button* (1963), 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405; *Shelton v. Tucker* (1960), 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231.

bargaining an organization of its classified employees in an appropriate unit,[6] set forth a mechanism for determining such units and affirmed that it would engage in collective bargaining with the employees' duly selected representative. It expressly conditioned its willingness, however, by restricting its obligation under the policy statement to organizations consisting exclusively of its employees and the use of bargaining representatives (negotiators) who were either employees of the school or attorneys. Regardless of the practical wisdom of either or both such restrictions, there appears to us to be no reason to invalidate them and the employees have advanced none except the assertion that they should be entitled to choose whomsoever they desired.

The school has no legal obligation to engage in collective bargaining with the classified employees. However, it may do so voluntarily, and accordingly could properly declare qualifications or restrictions establishing a basis upon which it would agree to bargain collectively.

It follows that since the classified employees did not comply with the policy conditions, there was no enforceable duty requiring the school to engage in collective bargaining. The court's injunction was, therefore, in this regard contrary to law.

Moreover, since the school was free to impose the conditions referred to, it did not illegally interfere with the employees' constitutional right to select whomsoever they desired as agent by refusing to deal with that agent. The point being that the school had no obligation to bargain collectively under the circumstances. Since there was, therefore, no evidence of illegal interference it was error for the court to enjoin the school from interfering with the employees' selection of bargaining representatives. *See Mullis v. Arco Petroleum Corp.* (D.C. Cir.1974), 502 F.2d 290, 293.

The judgment is therefore reversed and the cause is remanded to the trial court for such further proceedings consistent herewith as may be necessary.

Reversed and remanded.

HOFFMAN, P. J., concurs.

STATON, J., concurs and files separate opinion.

STATON, Judge, concurring.

Although concurring with the Majority Opinion, I wish to clarify my position. As the Majority correctly points out, the "critical fact" in the present case is that the school board is under no legal obligation to engage in collective bargaining. It is upon this fact which both errors of the trial court order rest.

In previous decisions, we have held that school boards have the authority to enter collective bargaining agreements. *East Chicago Teachers Union, Local No. 511 v. Board of Trustees of School City of East Chicago* (1972), 153 Ind.App. 463, 287 N.E.2d 891; *Gary Teachers Union, Local No. 4, American Federation of Teachers v. School City of Gary* (1972), 152 Ind.App. 591, 284 N.E.2d 108; but emphasized the *permissive* nature of that authority in contrast to any mandatory duty to enter negotiations. In the present case, the school board had no statutory, common law or contractual duty to enter negotiations. *See, County Department of Public Welfare of Lake County v. American Federation of State, County and Municipal Employees, AFL–CIO, Indiana Council 62* (1981), Ind. App., 416 N.E.2d 153; *Peters v. Poor Sisters of Saint Francis Seraph* (1971), 148 Ind.App. 453, 267 N.E.2d 558. Therefore, the trial court clearly erred in ordering the school board to negotiate with the employees.

As I recently noted in my concurring opinion to *County Department of Public*

6. We do not pass upon the policy's assertion that it would recognize an organization established in accord with its requirements as the exclusive agent for all employees within the unit. *See*, however, *Co. Dept. of Public Welfare, supra.* In any event the school could recognize an agent for those employees desiring to be represented by the agent.

Welfare of Lake County v. American Federation of State, County and Municipal Employees, AFL–CIO, Indiana Council 62, supra, 416 N.E.2d at 158, n.2:

> "Indiana courts have generally held that public employees may enter into collective bargaining agreements (and, by implication, consent election agreements) with their governmental employers even in the absence of specific statutory authority for collective bargaining... Such collective bargaining agreements are permissive and require the consent of both parties to make them enforceable...." (parentheses original, citations omitted)

Therefore, the collective bargaining process, one which is "permissive" and requires the "consent" of both parties, is based upon historic concepts of freedom to contract.

Apparently the school board, as evidenced by its policy statement, as well as the employees anticipated that their future employment relationship would be controlled by a collective bargaining agreement. The factual context out of which the trial court's order arose may aptly be denominated as "preliminary negotiations" to the formation of that contractual relationship. *See*, 1 Corbin on Contracts, § 22 (1963); 1 Williston on Contracts, § 27 (1957).

The proceedings between the school board and the employees should be viewed the same as any preliminary negotiations by two parties attempting to enter a contract. The school board's "voluntary policy for collective bargaining," as characterized by the Majority, was nothing more than an offer to bargain with the employees if the employees met the two conditions set by the policy. As in any preliminary negotiations, the employees could either accept or reject that offer. The employees chose to reject the school board's offer by not meeting either of the two conditions. The employees thereafter made a counteroffer by sending their chosen bargaining representative to negotiate with the school board. The school board rejected the counteroffer by refusing to negotiate with that representative.

The trial court was faced with a factual situation characteristic of most preliminary negotiations. Whether the first or last step in such negotiations, these are typically offers, counteroffers, acceptances and rejections. Recognizing that a certain amount of "coercion" is placed upon the party *forced* to either accept or reject an offer, I find such "coercion" a necessary by-product of allowing parties to freely bargain and contract. The freedom in the bargaining process necessarily carries the burden of making the choice to accept or reject offers and to bear the resulting consequences from that choice.

In the present case the employees attempt to raise the "coercion" in the preliminary bargaining process to the level of wrongful "interference" with their rights to organize and choose a bargaining representative. *See*, IC 22–7–1–2. However, the school board's policy was a self-imposed restraint setting two conditions precedent to its own negotiating rather than attempt to impose restraints upon the employees. That is, this policy restricts the conditions upon which the school board may negotiate as opposed to an attempt to restrict the conditions upon which the employees may negotiate.

Therefore, the error in the trial court order restraining the school board from "interfering" with the employees' right to organize and choose a representative was that the school board had not interfered with those rights by making its policy statement.

hardship to a substantial number of persons. [Acts 1947, ch. 341, § 15; P.L.144-1986, § 171.]

CHAPTER 3

LETTER FROM EMPLOYER UPON TERMINATION

22-6-3-1. Letter required — Contents — Exceptions. — Whenever any employee of any person, firm or corporation doing business in this state shall be discharged or voluntarily quits the service of such person, firm or corporation, it shall be the duty of such person, firm or the officer of the corporation having jurisdiction over such employee, upon written request of such employee, to issue such employee a letter, duly signed by such person, firm or officer, setting forth the nature and character of service rendered by such employee and the duration thereof, and truly stating for what cause, if any, such employee has quit or been discharged from such service: Provided, That this section shall not apply to any person, firm or corporation which does not require written recommendations or written applications showing qualifications or experience for employment. [Acts 1915, ch. 51, § 1, p. 107.]

Indiana Law Journal. Indiana Labor Relations Law: The Case For A State Labor Relations Act, 42 Ind. L. J. 77.

NOTES TO DECISIONS

ANALYSIS

In general.
Proceedings.

In General.

Similar statute in Missouri was upheld. Prudential Ins. Co. v. Cheek, 259 U. S. 530, 42 S. Ct. 516, 66 L. Ed. 1044, 27 A.L.R. 27 (1922).

Proceedings.

Pursuant to IC 34-4-32-1, proceedings under this section are to be prosecuted in the name of the State of Indiana. Hostettler v. Pioneer Hi-Bred Int'l, Inc., 624 F. Supp. 169 (S.D. Ind. 1985).

Collateral References. Liability of employer, supervisor, or manager for intentionally or recklessly causing employee emotional distress. 52 A.L.R.4th 853.

Liability for discharge of at-will employee for refusal to submit to drug testing. 79 A.L.R.4th 105.

22-6-3-2. Violations — Penalty. — A person who violates section 1 [IC 22-6-3-1] of this chapter commits a Class C infraction. [Acts 1915, ch. 51, § 2, p. 107; 1978, P.L. 2, § 2229, p. 2.]

Cross References. Black-listing employees, IC 22-5-3-1, 22-5-3-2.

Infraction and ordinance violation enforcement proceedings, IC 34-4-32.

CHAPTER 4

PUBLIC EMPLOYEE LABOR RELATIONS

22-6-4-1 — 22-6-4-13. [Repealed.]

Compiler's Notes. This chapter was held unconstitutional by the Indiana Supreme Court in Indiana Educ. Emp. Relations Bd. v. Benton Community Sch. Corp., 266 Ind. 491, 365 N.E.2d 752, 58 Ind. Dec. 261 (1977).

This chapter, concerning public employee labor relations, was repealed by Acts 1982, P.L. 3, § 1.

ARTICLE 7

LABOR ORGANIZATIONS

CHAPTER 1

BARGAINING REPRESENTATIVES

22-7-1-1. "Local union" defined. — As used in this chapter, the term "local union" shall mean any branch or chapter of a national labor organization, the jurisdiction of which is limited to a particular geographical area. [Acts 1957, ch. 181, § 1; P.L.144-1986, § 172.]

Valparaiso University Law Review. For Symposium on Rights, Work, and Collective Bargaining, 19 Val. U.L. Rev. 1 (1984).

Cited: Fort Wayne Educ. Ass'n v. Goetz, 443 N.E.2d 364 (Ind. App. 1982).

NOTES TO DECISIONS

In General.

This section and IC 22-7-1-2 do not impose upon an employer either a duty to recognize a union as collective bargaining agent or a duty to engage in the collective bargaining process. Michigan City Area Schs. v. Siddall, 427 N.E.2d 464 (Ind. App. 1981).

22-7-1-2. Right to select bargaining representative or local union. — No worker or group of workers who have a legal residence in the state of Indiana shall be denied the right to select his or their bargaining representative in this state, or be denied the right to organize into a local union or association to exist within and pursuant to the laws of the state of Indiana: Provided, That this act shall in no way be deemed to amend or repeal any of the provisions of the National Labor Relations Act [29 U.S.C., §§ 151-166]. [Acts 1957, ch. 181, § 2.]

Compiler's Notes. The reference to "this act" in the last proviso is to Acts 1957, ch. 181, § 2, which is codified as IC 22-7-1-1 and 27-7-1-2.

Indiana Law Journal. Indiana Labor Relations Law: The Case For A State Labor Relations Act, 42 Ind. L. J. 77.

Cited: Fort Wayne Educ. Ass'n v. Goetz, 443 N.E.2d 364 (Ind. App. 1982).

NOTES TO DECISIONS

ANALYSIS

In general.
Federal preemption.
Judicial powers limited.

In General.

This section and IC 22-7-1-1 do not impose upon an employer either a duty to recognize a union as collective bargaining agent or a duty to engage in the collective bargaining process. Michigan City Area Schs. v. Siddall, 427 N.E.2d 464 (Ind. App. 1981).

Federal Preemption.

The provisions of 29 U.S.C. § 164(a) dictate that Indiana not interpret the provisions of this section as giving rise to a cause of action against employers who terminate supervisory workers for engaging in union activities. Bowlen v. ATR Coil Co., 553 N.E.2d 1262 (Ind. App. 1990).

Judicial Powers Limited.

Legislative purpose and provisions of this section were not broad enough to validate action of trial court in ordering union election on its own motion after ordering permanent injunction against striking and disruptive picketing in same case. Peters v. Poor Sisters of Saint Francis, 148 Ind. App. 453, 267 N.E.2d 558, 25 Ind. Dec. 47 (1971).

Collateral References. Voting eligibility of employees absent because of illness, injury, or maternity leave. 85 A.L.R. Fed. 188.

Prohibition or limitation on display of signs of employees as unfair labor practice. 86 A.L.R. Fed. 321.

Recording of collective bargaining or grievance proceeding as unfair labor practice. 86 A.L.R. Fed. 844.

Requirements for obtaining court approval of rejection of collective bargaining agreement by debtor in possession or trustee in bankruptcy under 11 USC § 1113(b) and (c). 89 A.L.R. Fed. 299.

Procedural rights of union members in union disciplinary proceedings — modern state cases. 79 A.L.R.4th 941.

22-7-1-3. Penalty for preventing the forming or joining of a labor union. — A person who prevents another person from forming or belonging to a labor organization commits a Class B misdemeanor. [IC 22-7-1-3, as added by Acts 1977, P.L. 26, § 10.]

Cross References. Penalties for misdemeanors, IC 35-50-1, 35-50-3, 35-50-5-2.

CHAPTER 2

CONSTITUTIONS AND BY-LAWS

SECTION.

22-7-2-1. Rights, privileges and contracts between members and labor organizations enforceable. — Duly adopted constitutions, by-laws, and other laws of labor organizations, except when and to the extent that the provisions thereof may violate public policy, are hereby declared to be valid and enforceable contracts as between the members and officers of such labor organizations; and said contracts, and all rights and privileges

extended thereby and therein contained, are hereby declared to be enforceable in the courts of this state, by actions at law or in equity, brought by any individual member or members of such labor organization. Provided, however, That such member or members of such labor organization shall exhaust all rights, privileges and remedies provided by the constitution, by-laws, or other laws of said labor organization, before bringing any such action at law or in equity. [Acts 1957, ch. 338, § 1.]

Cited: Steele v. Brewery & Soft Drink Workers Local 1162, 432 F. Supp. 369 (N.D. Ind. 1977).

NOTES TO DECISIONS

Limitations on Power of Courts.

A court will not interfere in a union's internal decisions unless they are unreasonable or contrary to public policy. Communications Workers, Local 5701 v. Drake, 487 N.E.2d 821 (Ind. App. 1985).

The courts are not permitted to independently construe internal union rules or substitute a different interpretation of a union's constitution than that already rendered by the union. Communications Workers, Local 5701 v. Drake, 487 N.E.2d 821 (Ind. App. 1985).

Collateral References. Books and records of labor union, right of member to inspect. 64 A.L.R.2d 1158.

Exhaustion of remedies within labor union as condition of resort to civil court by expelled or suspended member. 87 A.L.R.2d 1099.

Fine validly imposed upon member, right of labor union to enforce in the courts. 13 A.L.R.3d 1004.

Liability of labor union or its membership for torts committed by officers, members, pickets, or others, in connection with lawful primary labor activities. 36 A.L.R.3d 405.

Prevailing union member's right to recover attorneys' fees in action against union or union officers. 9 A.L.R.3d 1045.

Right of labor union to exclude applicants for membership and remedies of applicant so excluded. 33 A.L.R.3d 1305.

Suspension or expulsion of member, wrongful, liability of labor union. 74 A.L.R.2d 783.

Union's liability in damage for refusal or failure to process employee grievance. 34 A.L.R.3d 884.

Validity and construction of § 501 of Landrum-Griffin Act (29 U.S.C. § 501), dealing with fiduciary responsibilities of officers of labor organizations. 15 A.L.R.3d 939, 85 A.L.R. Fed. 803.

Procedural rights of union members in union disciplinary proceedings — modern state cases. 79 A.L.R.4th 941.

Liability, under statute, of labor union or its membership for torts committed in connection with primary labor activities — state cases. 85 A.L.R.4th 979.

ARTICLE 8

OCCUPATIONAL HEALTH AND SAFETY LAWS

Please reconsider G-94-09-25
at the next regular session
10-25-94

11-15

Admn Appr _____

DIGEST SHEET

TITLE OF ORDINANCE: An Ordinance placing greater distinction between full and part-time employees.

DEPARTMENT REQUESTING ORDINANCE: Human Resources Department(9-1-94)

SYNOPSIS OF ORDINANCE: To place distinction between full and part-time employees as more individuals have begun to work schedules of less than forty (40) hours per week.

EFFECT OF PASSAGE: Full-time employees may no longer be considered as such if they work less than forty (40) hours per week. New part-time employees may no longer be eligible for health insurance benefits.

EFFECT OF NON-PASSAGE: Full-time employees may stay the same if working less than forth (40) hours per week. New part-time employees may continue to be eligible for health insurance benefits.

MONEY INVOLVED (DIRECT COSTS, EXPENDITURES, SAVINGS):

ASSIGNED TO COMMITTEE (PRESIDENT): _____

BILL NO. G-94-09-25

REPORT OF THE COMMITTEE ON
REGULATIONS
REBECCA J. RAVINE - MARK E. GiaQUINTA - CO-CHAIR
DONALD J. SCHMIDT
JANET G. BRADURY

WE, YOUR COMMITTEE ON REGULATIONS TO WHOM WAS

REFERRED AN (ORDINANCE) (~~RESOLUTION~~) AMENDING POLICY 8.1.A.12 OF THE CITY'S POLICY AMD PROCEDURE MANUAL

HAVE HAD SAID (ORDINANCE) (~~RESOLUTION~~) UNDER CONSIDERATION AND BEG LEAVE TO REPORT BACK TO THE COMMON COUNCIL THAT SAID (ORDINANCE) (~~RESOLUTION~~)

DO PASS	DO NOT PASS	ABSTAIN	NO REC
Janet G. Bradury			
Rebecca Ravine			
D Schmidt			

DATED: 10-25-94.

Sandra E. Kennedy
City Clerk